

3. The Overwhelming Evidence in the Record Confirms That Four Jacks Misrepresented and Lacked Candor Before the Commission Regarding the Three Smiths' Pledge to Resign Their Then-Current Employment

223. The testimony of the three Smiths at the 1993 hearing, before the addition of this issue, also confirms that they are employees of Sinclair and that they recognize their status to be one of employment with Sinclair. Similarly, the documentary evidence, and related testimony, presented at the 1994 hearing affirms the conclusion that the three Smiths are employees of Sinclair and have represented themselves consistently as Sinclair employees to others, including, inter alia, the SEC, the IRS, and the Commission itself. The evidence shows that the first and only circumstance where the three Smiths have argued that they are not employees of Sinclair was in opposition to the misrepresentation issue pending against Four Jacks in this proceeding.

224. In light of the cumulative evidence presented at the 1993 and 1994 hearings, the Presiding Judge concludes that the three Smiths were aware of their employment status at Sinclair. Relatedly, it is concluded that this evidence mandates a finding that the three Smiths misrepresented and lacked candor before the Commission in connection with their pledge to resign their then-current employment.

a. At the 1993 Hearing, the Three Smiths Characterized Themselves as Employees of Sinclair in Name and Deed

225. At the 1993 hearing, each of the three Smiths embraced the concept that he was an employee of Sinclair. More

specifically, each of the three Smiths affirmatively testified that he is an employee of Sinclair. T. at 1134, 1239, 1371. In fact, David Smith volunteered that he is an employee of Sinclair in response to a question on another issue. T. at 1134. Notably, all of these admissions were made before the addition of this issue. As the Four Jacks principals now claim that they have never considered themselves employees of Sinclair, see, e.g., FJ28 at ¶ 6, the three Smiths' voluntary characterizations of themselves as employees of Sinclair at the 1993 hearing is powerful evidence supporting a finding of misrepresentation and lack of candor.⁴¹

226. Other testimony at the 1993 hearing confirms the conclusion that the Smiths are employees of Sinclair and consider themselves as such. The evidence shows that:

- the three Smiths each worked, on the average, at least 9 a.m. to 5 p.m. for Sinclair, five days a week, see, e.g., T. at 1244, 1248;
- the three Smiths received substantial compensation from Sinclair for their services, including a set salary, see, e.g., SH40, Tab 14 at 55-56; and
- each of the three Smiths performed duties at Sinclair which extended from supervision of Sinclair subsidiary stations, to personnel and programming decisions, and the Smiths have ultimate say on all Sinclair budgetary decisions. See, e.g., T. at 1925, 1989, 1241, 1329-31.

227. Furthermore, at the 1993 hearing, counsel for Scripps Howard expressly asked David Smith about his pledge to resign his

⁴¹ In fact, there was no evidence presented at the 1993 hearing contradicting the three Smiths' characterizations of themselves as employees.

then-current employment. More specifically, David Smith was asked whether the public had been advised in Sinclair's SEC filings that he is going to leave Sinclair if Four Jacks is successful. T. at 1096-97. David Smith's answers, in response to specific questions about the scope of his integration pledge, concealed the three Smiths' intention to remain at their positions at Sinclair.

228. First, Scripps Howard's counsel asked David Smith whether Sinclair's September 28, 1994, SEC filing made any reference to his integration pledge to resign his then-current employment. In response to that question, he did not explain that he had no intention of resigning his position at Sinclair or that he did not consider his integration pledge to apply to Sinclair. Instead, he testified that Sinclair's September 28, 1993 SEC filing made his intentions clear:

In the event that I leave [Sinclair] as a result of being successful with Four Jacks, the public has been advised.

T. at 1096.

229. Scripps Howard's counsel then clarified the question further by asking, point blank, what language advised the public that David Smith was going to leave Sinclair if Four Jacks is successful. David Smith responded that:

I read that document to suggest and make clear to the public that in the event that I am not there as a key personnel or that other key personnel aren't there, they're so advised

T. at 1096-97.

230. David Smith's answers to these questions regarding the meaning of the pledge strongly suggested that David Smith would leave Sinclair if Four Jacks were granted the license for Channel 2. Thus, even when explicitly asked about the scope of his pledge, David Smith did not, at any time, reveal or even hint that he would remain at Sinclair, but instead he concealed this intention. Such unwillingness to reveal his true intentions to remain at Sinclair in the face of such questioning falls far short of the candor required of Commission applicants.

231. In sum, the testimony at the 1993 hearing confirmed that the three Smiths are employees of Sinclair in both name and deed. The "spontaneous, candid" testimony on this point by the three Smiths at the initial hearing cannot be squared with Four Jacks' position, after the addition of the issue, that the three Smiths are not employees of Sinclair. See, e.g., FJ28 at ¶ 6; Swan Creek, 1994 U.S. App. Lexis 33055 at *6 (applicant disqualified on misrepresentation grounds where impossible to reconcile candid prior testimony with contrary story offered at subsequent hearing). In fact, where, as here, such an "irremediable conflict" appears between records submitted to the Commission and testimony in the instant proceeding, lack of candor could be found even absent a subsequent evidentiary hearing. Swan Creek, 1994 U.S. App. Lexis 33055 at *7.⁴²

⁴² Here, of course, Four Jacks enjoyed a subsequent opportunity at evidentiary hearing to explain these conflicts, but it was wholly unable to do so.

b. Documentary Evidence and Testimony Presented During the 1994 Hearing Confirms That the Smiths Are Employees of Sinclair and That They Lacked Candor Before the Commission

232. Documentary evidence, and related testimony, presented during the 1994 hearing removes any doubt that the three Smiths are employees of Sinclair and were aware of this fact at the time the three Smiths made the pledge to resign contained in the Application.

233. First, documentary evidence shows that the Smiths' company, Sinclair, and the three Smiths individually have represented to numerous government agencies that the three Smiths are employees of Sinclair. These documents include:

- the three Smiths' IRS filings, see, e.g., SH39;
- the three Smiths' W-2 forms from Sinclair, see, e.g., SH40, Tabs 3-5;
- Sinclair's EEO Reports submitted to the Commission, see, e.g., SH42, SH43, SH44; and
- Sinclair's Maryland state unemployment insurance filings, see, e.g., SH40, Tab 2.

234. Second, documentary evidence demonstrates that Sinclair has treated the three Smiths as employees for all purposes. These documents demonstrate the three Smiths' participation in Sinclair's:

- Executive Bonus Plan for key management employees, see, e.g., SH40, Tab 14 at 55-56;
- employee 401(k) plan, see, e.g., SH40 at 3;
- employee health care plan, see, e.g., SH40, Tab 30;
- employee insurance plan, see, e.g., SH40, Tab 31;

- employee long term disability plan, see, e.g., SH40, Tab 29;
 - employee loans, see SH41 at 19; and
 - corporate credit cards. See T. at 1922, 2178.
- c. The Representations in the Documentary Evidence That the Three Smiths Are Employees of Sinclair Are Entitled to Substantial Weight
- i. Sinclair's Characterization of the Smiths as Employees for 401(k) Purposes is Probative of the Smiths' Employment Status Because a 401(k) Plan That Includes Non-Employees is Void

235. These representations regarding employment are not without consequence. For example, Sinclair's characterization of the three Smiths as employees for purposes of its 401(k) plan resulted in substantial monetary gain for the three Smiths at the expense of the United States Treasury. See SH40, Tab 14 at 56. These monetary benefits are, however, a benefit available only to Sinclair employees and their beneficiaries under Sinclair's 401(k) retirement plan. 26 U.S.C. § 401(a)(2); Nationwide Mutual Ins. Co. v. Darden, 112 S.Ct. 1344 (1992) (only employees and their beneficiaries can benefit from plans under Employee Retirement Security Act of 1974 (ERISA)). Thus, by participating in Sinclair's 401(k) retirement plan, the three Smiths have represented that they are employees of Sinclair as that term is generally used. Darden, 112 S.Ct. 1344 (under ERISA, an "employee" is defined under traditional common law tests).

236. Sinclair's representation of the three Smiths as employees for purposes of the company's 401(k) plan is also not without substantial risk if their status were truly in question:

a 401(k) plan is disqualified if the plan includes any non-employees. 26 U.S.C. § 401(a)(2) (entire plan not eligible under IRS Code if money not used for exclusive benefit of employees and their beneficiaries).

ii. Sinclair's Characterization of the Smiths as Employees of Sinclair Resulted in Unemployment Insurance, a Benefit Unavailable to Non-Employees

237. Similarly, Sinclair's representation that the three Smiths are employees of Sinclair resulted in the benefit to them of having unemployment insurance. Such a benefit is unavailable to non-employees under Maryland law. See Md. Code Ann., Labor and Employment, §§ 8-106, 8-201 (sections pertaining to "Protection of covered employees" and "Covered employment").

d. The Smiths Have Simultaneously Represented to the Commission That They Both Are and Are Not Employees of Sinclair

238. It is of particular note that David Smith, as President of Sinclair, has annually signed Sinclair's certified representations to the Commission concerning its employees. The three Smiths are included in the total number of Sinclair's full-time employees in these representations. T. at 1889-90; SH42, SH43, SH44, SH40, Tab 33. Thus, while David Smith claims in this proceeding that the three Smiths are not Sinclair employees, he has represented for years in Sinclair's EEO reports that the three Smiths are numbered among the full-time Sinclair employees. T. at 1889-90. One or the other of these representations to the Commission is flatly false, and yet no effort was made to reconcile these conflicting representations. A willful

presentation of false information to the Commission has thus necessarily occurred, and this alone could warrant disqualification without further inquiry as serious misconduct occurring directly before the Commission's eyes. See, e.g., RKO General Inc. v. FCC, 670 F.2d 215, 234 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982).

239. David Smith, however, was provided with notice and an opportunity to explain these inconsistencies at the 1994 hearing, and yet he failed to provide an explanation for his contradictory positions before this agency. The explanation offered by Four Jacks' counsel, that the Commission does not have separate forms for "employees" and "officials and managers," T. at 1891, is wholly irrelevant. If the Smiths were not employees, they simply should not be listed at all on this important employment reporting form.

e. Documentary Representations That the Smiths Are Employees of Sinclair Are Entitled to Substantial Weight as Many of These Representations Were Made Under Penalty of Perjury or Similar Oath

240. Furthermore, many of these representations regarding employment, such as the FCC EEO filing, are made under the penalty of perjury or attested to by the personal signature of an authorized Sinclair employee, including:

- the three Smiths' personal IRS filings, see, e.g., T. at 1805-06;
- Sinclair's Maryland state unemployment insurance filings, see, e.g., SH40, Tab 2;
- Sinclair's health care benefits forms. See SH40, Tab 32.

241. Four Jacks has not provided documentary evidence of any instance where the three Smiths were classified as anything other than employees of Sinclair. Indeed, David Smith was unable to identify any Sinclair employee benefit plan in which he and his brothers did not participate. T. at 1764. This unrebutted documentary evidence is entitled to great weight and supports the inescapable conclusion that the three Smiths are knowing employees of Sinclair, who took full advantage of private and government benefits limited by law to employees.

242. The fact that the three Smiths were involved in the oversight or administration of many of Sinclair's employee benefits also confirms the conclusion that they were aware of their employment status. For example, David Smith was a trustee of Sinclair's 401(k) plan. SH40, Tab 11 at FJC0031. Similarly, Frederick Smith is involved in the periodic evaluation of Sinclair's health care plan and is a trustee of this plan. T. at 1298, 2160; SH40, Tab 30 at FJS0164. Frederick Smith also has worked on Sinclair's 401(k) plan. T. at 1298.

4. The Three Smiths' Explanations, Proffered After the Addition of the Issue, Regarding the Meaning of the Pledge and Their Employment Status at Sinclair Are Inconsistent, Unbelievable, and Inadequate to Resolve the Misrepresentation Issue in Four Jacks' Favor

243. In an effort to camouflage the clear meaning of the pledge and to obscure evidence demonstrating the three Smiths' employment at Sinclair, Four Jacks has offered a variety of explanations for the "true" meaning of the pledge to resign. Various explanations have been offered and then abandoned--much

like a series of trial balloons--in a transparent effort to identify one that would withstand critical examination and permit resolution of the added issue in Four Jacks' favor.

244. The evidence instead shows that these explanations are inconsistent with each other and inconsistent with the testimony of the three Smiths. The evidence further shows that Four Jacks has been undeterred by the revealed falsity of these explanations and has continued, up through the latest hearing, to conjure up new explanations as quickly as the old ones were discredited.

a. Four Jacks' Interpretations of the Meaning of the Pledge Are Without Merit

i. Four Jacks' Claim That the Pledge Applies to the Three Smiths' Full Time Presence at WBFF Is Flatly Contradicted by David and Robert Smith's Testimony

245. After the addition of this issue, Four Jacks argued that the pledge to resign pertained to the Smiths' involvement in their Baltimore station, WBFF. Four Jacks made this claim in identically worded declarations by the three Smiths, submitted on behalf of Four Jacks' Motion for Summary Decision. The declarations were, in fact, the only evidence submitted by Four Jacks in support of its Motion for Summary Decision.

246. In the declarations, each of the three Smiths testified that the words "then-current employment" referred to any future employment or consulting contracts and to his "full time presence at WBFF(TV)." See, e.g., SH45 at ¶ 6.

247. The proposition that the pledge to resign "then-current employment" applies to WBFF, however, is flatly contradicted by testimony from the Four Jacks principals. For example, when

Robert Smith was asked at his July 1994 depositions whether he was employed by WBFF, he responded that "Sinclair Broadcasting [sic] Group is my employer." T. at 2022.

248. Similarly, at the 1994 hearing, David Smith admitted that he does not have a full time position at WBFF and conceded that he has no employment to resign at WBFF. T. at 1910, 1920.

249. As the three Smiths' claim concerning their full-time presence at WBFF was discredited by their own testimony, Four Jacks retreated from the position taken in the declarations offered in support of Summary Decision.⁴³ Thus, Four Jacks made the claim that the three Smiths had a full time presence at WBFF in an attempt to resolve the misrepresentation issue in its favor and then subsequently abandoned the contention. Four Jacks willingness to change its story on such a central point supports a finding of lack of candor. See Garden State Broadcasting Ltd. v. FCC, 996 F.2d 386, 393 (D.C. Cir. 1993) (Commission not

⁴³ In their 1994 direct case testimony, the three Smiths instead claim that the pledge was intended to make clear that they would give up all of their responsibilities at WBFF(TV). See, e.g., FJ26, at ¶ 5. Even this claim is, however, contrary to the record for two reasons. First, this argument was rejected by the Presiding Judge, in a decision denying Four Jacks' Motion for Summary Decision, as unsupported by the evidence because there is no evidence that the Smiths have any responsibilities at WBFF, separate and apart of those duties which they perform to the extent that WBFF(TV) is one of Sinclair's many subsidiary television stations. Memorandum Opinion and Order, F.C.C. 94 M-246, at ¶10 (released April 11, 1994).

Second, the claim that the pledge applies in any way to WBFF is contrary to testimony at the 1994 hearing regarding the pledge. See, e.g., T. at 1919-20 (because he is required to divest his interest in WBFF(TV) in the event of a grant of four Jacks' Application, David Smith would have no involvement in WBFF).

expected to play procedural games with applicant to ascertain the truth); Swan Creek, 1994 U.S. App. Lexis 33055 at *7 (applicant's "recharacterization" of one of its proposals was an improper attempt to harmonize its two inconsistent applications). See Richardson Broadcast Group, 7 F.C.C. Rcd 1583, 1584 (applicant's evasiveness and willingness to withhold information disqualifying).⁴⁴

ii. Four Jacks' Claim That the Pledge to Resign Is Merely Inartful Is Not Credible

250. Four Jacks also now claims that it has not lacked candor before the Commission because the pledge was simply "inartfully worded." See, e.g., FJ26 at ¶ 5. It defies reason to believe this contention. The pledge contained in the Application was volunteered by Four Jacks without prompting from the Commission, opposing counsel or the Mass Media Bureau. It was subsequently repeated verbatim, by each of the three Smiths, in numerous other pleadings submitted to the Commission by Four Jacks. See, e.g., FJ2 at 1; FJ3 at 1; FJ4 at 1; SH45 at ¶ 6. The Smiths were also each cross examined on the pledge at the 1993 hearing, thus giving them numerous opportunities to clarify the meaning of the pledge. See e.g., T. at 1074, 1374.⁴⁵

⁴⁴ Relatedly, Four Jacks has provided no explanation for its changing story on this point. Indeed, it has none as the three Smiths' relationship to WBFF is not a fact difficult to discern or likely to change.

⁴⁵ To the extent that the Four Jacks' pledge is purposefully vague and the language "then-current employment" is used to avoid making any tangible commitment to the Commission, it is further evidence of Four Jacks' lack of candor in this proceeding. See RKO General, Inc. v. FCC, 670 F.2d 215, 230-31

251. The claim that the pledge was inartfully drafted also lacks credibility given that the three Smiths are seasoned broadcasters, all of whom claim credit in the Application for broadcast experience. These multiple broadcast station owners have previously appeared before the Commission in connection with other applications and thus have knowledge about the Commission's requirements and procedures. Cf. Swan Creek, 1994 U.S. App. Lexis 33055 at *7 n.8 (first time applicant disqualified for changing story before the Commission). Relatedly, Four Jacks is represented by experienced communications counsel. Omaha Channel 54 Broadcasting Group, 3 F.C.C. Rcd 870 (Rev. Bd. 1988) (Martin A. Leader and Kathryn R. Schmeltzer representing applicant Omaha Telecasters, Inc.); see Swan Creek, 1994 U.S. App. Lexis 33055 at *7, n.8 (first time applicant disqualified even though it did not have counsel for part of the proceeding).

252. Finally, the obligation to resign current employment as a condition of obtaining integration credit is well established and this language appears designed to meet this well known requirement. See Emission de Radio Balmeseda, Inc., 7 F.C.C. Rcd 3852, 3861 n.30 (Rev. Bd. 1992) (pledge to work full time as an integrated principal in station management must include a "specific, unambiguous pledge of total resignation from current full-time employment), aff'd, 8 F.C.C. Rcd 4335 (1993); Woods Communications Group, Inc., 7 F.C.C. Rcd 78, 79-81 (1991); See SH46 (Exh. 6 entitled "Integration"). Further, the Presiding

(D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982).

Judge expressly spelled out this requirement for the parties. See Prehearing Conference Order, FCC 93M-146 at 1, n.1 (released April 6, 1993).

253. Under these circumstances, the Presiding Judge rejects Four Jacks' claim that the pledge was merely "inartfully" drafted.

iii. Four Jacks' Claim That the Pledge Applies Only to Future Employment Is Rejected as Contrary to the Record and Common Sense

254. Four Jacks contends that the pledge was never intended to apply to the three Smiths' positions at Sinclair. See e.g., FJ26 at ¶¶ 3, 5, 7. The three Smiths also contend that they have no current employment and that the pledge applies only to future employment. See e.g., T. at 1915. As previously noted, this argument is defective because the Application clearly sets forth that Robert and Frederick Smith are employees of Sinclair and each of the three Smiths testified at the 1993 hearing that they are employees of Sinclair.

255. Such a claim is also disproved by the procedural record of this proceeding. The Presiding Judge requested from each party a statement setting forth each party's integration commitment, including "their definitive intentions to leave their current employment" Prehearing Conference Order, FCC 93M-146, at 1, n.1 (released April 6, 1993) (emphasis added). In response to this order, the three Smiths again pledged to resign their "then-current employment." See SH47. This circumstance

demonstrates that the pledge must pertain to the three Smiths' current, and not future, employment.

256. Common sense also undermines the credibility of this particular explanation. If the three Smiths had wanted the pledge to cover only their future employment, they could have done so in a clear and unambiguous manner. Furthermore, it is highly doubtful that the Smiths will acquire any such future employment. Since the addition of the issue, the evidence has been clear that the three Smiths have no intention of leaving their positions as officers of Sinclair, where they manage a multi-million dollar communications holding company. Given the Smiths' continuing commitment to Sinclair evidenced in Sinclair's SEC filings, it is highly implausible that the three Smiths have sufficient time to devote to any new, additional future employment. Thus, the three Smiths' claim that the pledge applies to future employment is rejected.⁴⁶

b. The Three Smiths' Explanations, After the Addition of the Issue, Regarding Their Employment Status Are Rejected as Contrary to the Three Smiths' Prior Characterizations of Themselves as Employees of Sinclair

257. Four Jacks contends that, as owners of Sinclair, the three Smiths are not "true" employees of Sinclair. Such a distinction is unsupported by the credible evidence.

⁴⁶ In their testimony at hearing, the three Smiths provided several unrealistic examples of such possible future employment, including head of Paramount Studios, commercial aviator and working at McDonald's. These unrealistic examples further undermine the credibility of the claim that the pledge applies to future employment.

i. Four Jacks' Claim That the Three Smiths Are Owners of Sinclair, But Not Employees, Is Contrary to the Evidence

258. As the three Smiths have previously referred to themselves as Sinclair employees, their attempts to retract these "frank admissions" shows a lack of candor. Swan Creek, 1994 U.S. App. Lexis at 7 (quoting Welch Communications, Inc., 7 F.C.C. Rcd 4542, 4547 (Rev. Bd. 1992), modified, 8 F.C.C. Rcd 1285 (1993)). Four Jacks' claim that the Smiths are owners and bosses of Sinclair, as opposed to employees, also ignores the Smiths' own admissions that they are officers of the corporation and serve at the will of the board of directors.⁴⁷ T. at 1767, 2025. Thus, David Smith conceded that he could be fired from his position as a "boss" at Sinclair by the Board of Directors. T. at 1766.

259. The three Smiths' claim that their status as individual part owners of a corporation precludes them from being employees of that company is also contrary to common sense. As Frederick Smith freely conceded, for example, he considered himself an employee of a dental corporation in which he was the sole shareholder and officer. T. at 2131, 2133.

⁴⁷ In this connection, Scripps Howard requests the Presiding Judge to take notice of the fact that the three Smiths are not the only members on the Sinclair board of directors, which also include Basil A. Thomas and J. Duncan Smith. SH40, Tab 17 at 56. This fact demonstrates that the three Smiths do not have sole decision making power in connection with Sinclair.

This evidence of additional participation on the board is contained in one of Sinclair's SEC filings. While the evidence was not discussed at hearing, it is a straightforward fact which is probative on the pending added issue. As such, no prejudice will result from Four Jacks' lack of opportunity to address this fact at hearing.

ii. Four Jacks' Claim That the Smiths Are Not True Employees Is Rejected for Lack of Any Supporting Evidence

260. Four Jacks' attempt to distinguish between the three Smiths and the "true" employees of Sinclair also fails. Four Jacks has not cited any prior instance, before the addition of this issue, where Sinclair or the three Smiths ever made this distinction between the three Smiths and "true" employees of Sinclair. In fact, on cross examination at the 1994 hearing, Robert Smith was unable to remember any such instance. See, e.g., T. at 2075.

261. Furthermore, the three Smiths' definition of true employees lacks any consistency. On the one hand, Robert Smith testified that everyone at Sinclair other than the three Smiths is a true employee because they "punch a time clock." On cross examination, however, he stated that none of Sinclair's employees punched time clocks, including David Amy. T. at 2073-76.

262. Finally, Four Jacks' attempt to distinguish between employees and "true" employees strains credibility. The Smiths are either employees of Sinclair or they are not. The proffer of such a facially meritless explanation further confirms this applicant's lack of candor.

iii. Frederick Smith Was Inconsistent Regarding Whether Sinclair Has Any Employees

263. At his deposition in July 1994, Frederick Smith testified that the Smiths are not employees of Sinclair and in fact, Sinclair has no employees. Frederick Smith recanted this contention at the hearing, further demonstrating the elasticity

of the three Smiths' representations in this proceeding. T. at 2136.

c. Four Jacks' Remaining Explanations Are Dubious and Unworthy of Belief

264. On behalf of their contention that they have not lacked candor with the Commission, the Four Jacks principals have also made several unbelievable statements in their 1994 declarations. These statements do not support Four Jacks' position and are, in fact, "so out of touch with reality as to be classified as 'inherently incredible.'" Swan Creek, 1994 U.S. App. Lexis 33055 at *4-5 (citations omitted); see T. at 2113 (Robert Smith acknowledging that the three Smiths' story is "very hard to understand and to believe"). 265. First, the three Smiths attempt to minimize the probative value of their W-2 forms from Sinclair, which refer to them as employees of Sinclair, by claiming that they are required to receive such forms because they receive money from the company. David Smith conceded, however, that he understood that an employee of a company receives a W-2 form while a non-employee does not. T. at 1823-25. Thus, even though David Smith must have understood that the statement in his 1994 direct case testimony regarding why he receives a W-2 from Sinclair was incorrect, he submitted the statement anyway in an effort to exonerate Four Jacks on the added issue. This willingness to deceive the Commission undermines the credibility of Four Jacks' proffered explanations pertaining to the added issue and evidences a lack a candor in Four Jacks' pleadings before the Commission. Leflore

Broadcasting Co.v. FCC, 636 F.2d 454, 462 (D.C. Cir. 1980) (fact of misrepresentation and knowledge of falsity is sufficient to justify finding of intent to deceive). Such callous disregard for the truth, with the clear motive of benefiting Four Jacks, is strong evidence of misrepresentation.⁴⁸

266. Second, the three Smiths steadfastly maintain that they have made their intention to remain at Sinclair clear throughout this proceeding. On the contrary, there is no instance in the record where Four Jacks disclosed the Smiths' intention to remain at Sinclair until the relevant representation of this fact to the SEC was discovered by opposing counsel. The three Smiths' stubborn adherence to a position so at odds with the record is further evidence of their unwillingness to be candid with the Commission concerning the added issue.

d. The Three Smiths' Testimony Before the Addition of the Added Issue Is Credible, But Their Subsequent Self Serving Testimony at the 1994 Hearing Is Not

267. Based on all of the evidence, the Presiding Judge concludes that the testimony of the three Smiths is self serving and not credible concerning the meaning of their pledge to resign and their employment status at Sinclair.

268. On the other hand, the Presiding Judge finds that the three Smiths' testimony from the 1993 hearing is credible in that it contains "frank, candid" admissions regarding their employment

⁴⁸ The three Smiths' concessions that they really know nothing about the tax code also makes the direct case testimony regarding W-2 forms unconvincing and incredible. This circumstance also demonstrates, once again, the three Smiths' willingness to mislead to Commission on the added issue.

at Sinclair and the meaning of the pledge to resign then-current employment.

5. Four Jacks Lacked Candor Regarding Its Intention to Manage Channel 2 as a Management Committee

269. It is also concluded that the three Smiths have not been consistent or accurate in their representations about how they intend to run Channel 2. The Application and the 1993 hearing testimony represent that they will all jointly participate in the management of Channel 2, regardless of their titles. SH46 (Exh. 6 at 4); T. at 2204-05 (Frederick Smith testifying that they will run Channel 2 by committee, the same way the Smiths run Sinclair). Thus, the only credible interpretation of the evidence before the addition of the misrepresentation issue is that the three Smiths will run Channel 2 just like they run Sinclair. T. at 2204-05; T. at 1152.

270. At the 1994 hearing, Frederick Smith disclaimed his earlier testimony of how the Smiths intended to run Channel 2. Instead, he and his brother Robert testified that the brothers would each have specific duties and that David Smith would have ultimate decision making responsibility as general manager. T. at 2206, 2115.

271. The two stories told by the Smiths regarding management by committee are inconsistent. It is concluded that Four Jacks' first story that the three Smiths intended jointly to manage Channel 2 by committee is more worthy of belief. This story is explained in frank and unambiguous terms in the Application and testimony at the 1993 hearing.

272. Relatedly, it is also concluded that Four Jacks' intent to jointly manage Channel 2 is contrary to the three Smiths' commitment to participate in specific management positions at Channel 2 and that Four Jacks concealed its true intention from the Commission. That the Smiths testified that they had never discussed the management by committee issue, T. at 1149, 1271-72, further supports the view that they simply intended to run Channel 2 via an extension of Sinclair's management by committee approach.

273. Four Jacks' lack of candor on this point also confirms its general lack of candor before the Commission regarding the integration commitment of the three Smiths.

6. Four Jacks Had a Motive to Deceive the Commission Regarding the Three Smiths' Pledge to Resign Employment

274. The contradiction between the pledge contained in the Application and the three Smiths' belatedly revealed intent to remain at Sinclair concerns a relevant and material issues central to Four Jacks' Application: integration credit.

275. The motive behind Four Jacks' lack of candor and misrepresentation is clear: Four Jacks wished to give itself a comparative advantage for integration, while intending that the three Smiths would in reality retain their current positions at their family-run communications business. Thus, the Presiding Judge concludes that Four Jacks had ample motive to misrepresent and lack candor before the Commission.

276. Four Jacks claimed integration credit for the three Smiths, who each pledged to work full-time, 40-hours a week at

Channel 2. For persons with outside interests, the pledge to resign current employment is a required representation that must be made before the Commission will credit any claim for an integration preference. See, e.g., Woods Communications, 7 F.C.C. Rcd at 80. The pledge serves to assure the Commission that the proposed integrated principal will have sufficient time to devote to his or her position at the new station. Id.; Prehearing Conference Order, FCC 93M-146 (released April 6, 1993) (requiring each party to file a definitive statement regarding its integration proposal).

277. In light of these precedents, the three Smiths' pledge to resign their then-current employment was a clear prerequisite to the Commission granting them any integration credit. Thus, the three Smiths made the required pledge. At the same time, they concealed their intentions to remain in their current positions at Sinclair out of justifiable fear that integration credit would be denied if their intent to remain at Sinclair was disclosed. Thus, the three Smiths could reasonably have intended to maintain their current employment at Sinclair while still gaining credit for proposing to be integrated principals at Channel 2, with little expectation that their false promise would be exposed. Indeed, had the SEC not required a more specific explanation to the public of the Smiths' employment plans with Sinclair, the Commission might never have learned of the three Smiths' current intention to remain as officers of Sinclair even if they should obtain Channel 2.

7. Ultimate Conclusions

278. The three Smiths claim that they have never made any pledge that requires them to resign from their positions as officers of Sinclair. Based on a simple reading of the Application, however, it is concluded that the pledge to resign their then-current employment, as understood by any reasonable person, would require the three Smiths to resign their employment at Sinclair. Thus, the pledge is irreconcilably inconsistent with the three Smiths' intent to remain at Sinclair. At the very least, the representations in the Application constitute a breach of Four Jacks' duty "to be fully forthcoming as to all facts and information relevant to a matter before the [Commission], whether or not that information was solicited." Silver Star, 3 F.C.C. Rcd at 6349; Fox River Broadcasting, 93 F.C.C. 2d at 129.

279. The lack of candor arising from the Application is confirmed by evidence adduced at the 1993 hearing. At the 1993 hearing each of the three Smiths described himself as an employee of Sinclair, a characterization directly contrary to the current claim that they are not employees of Sinclair. As Four Jacks' representations in its Application and the 1993 hearing contrast with completely different testimony at a subsequent hearing, Four Jacks has at a minimum lacked candor before the Commission. See Swan Creek, 1994 U.S. App. Lexis 33055 at *12; Richardson Broadcast Group, 7 F.C.C. Rcd 1583, 1585 (1992) (Commission's ability to rely on a applicants representation is "crucial" to functioning of regulatory process).

280. Finally, Four Jacks' misrepresentation and lack of candor are affirmed by the evidence adduced after the addition of the issue. Four Jacks has not presented a credible explanation for the simple contradiction between the pledge to resign employment and the three Smiths' later professed intention to remain in their current positions at Sinclair. The explanations that Four Jacks has presented are inconsistent with each other and unbelievable.

281. Relatedly, Four Jacks has continued to change its story on this issue. For example, it has presented no less than three different explanations for the "true" meaning of the pledge to resign. In addition, immediately after the addition of the issue, it contended that the pledge related to the three Smiths' full time presence at WBFF. Shortly after deposition examination proved this contention to be untrue, Four Jacks abandoned this claim, which was previously a central contention of its Motion for Summary Decision.

282. It is also concluded that despite the three Smiths' repeated denials of their employment relationship with Sinclair, the Smiths must have been aware that they were considered Sinclair employees by the rest of the world. Such a conclusion is buttressed by the fact that, at the 1994 hearing, Frederick Smith conceded that the average person might conclude that he is an employee of Sinclair. T. at 2138-39.

283. The consistent story that emerges from all the evidence is a simple one. The three Smiths represented themselves as


employees of Sinclair prior to the misrepresentation issue but, after the issue was added, they then claimed not to be employees of Sinclair. Accordingly, it is concluded that the pledge to resign employment was "an intentional misrepresentation or act intended to deceive" the Commission. Silver Star, 3 F.C.C. at 6349.

284. Finally, it is concluded that Four Jacks lacked candor before the Commission regarding the three Smiths' intention to manage Channel 2 by management committee, regardless of their titles.

IV. CONCLUSION

WHEREFORE, Scripps Howard Broadcasting Company respectfully requests that the Presiding Judge adopt the foregoing proposed findings of fact and conclusions of law.

Respectfully submitted,
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